COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3070 **Cir. Ct. No. 2005CV3076**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL. NATE A. LINDELL,

PETITIONER-APPELLANT,

V.

MATTHEW FRANK AND RICHARD SCHNEIDER,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN III and RICHARD G. NIESS, Judges. *Affirmed*.

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Nate Lindell, a Wisconsin inmate, appeals an order dismissing his petition for certiorari review of a prison disciplinary decision, and an order denying reconsideration. The court dismissed the petition shortly after

receiving it, concluding that it failed to state claims for which the court could grant relief. We affirm.

¶2 While incarcerated at the Wisconsin Secure Program Facility, Lindell received a conduct report charging him with possessing contraband and with engaging in gang related activities. Specifically, the report alleged that Lindell possessed a letter mailed to him referring to activities of a gang known as the "Aryan Circle" and a notebook recording Lindell's correspondence with gang members concerning subjects such as expansion of the gang and starting a gang newsletter.

¶3 Lindell received a hearing on the charges and a disciplinary committee found him guilty of violating WIS. ADMIN. CODE §§ DOC 303.20(3) and 303.47(2)(a). The Committee found that his notebook and the letter contained references to gang activity and allowed an inference that Lindell participated in gang related activity. Lindell's petition for certiorari review alleged that there was insufficient evidence to find him guilty of the offenses; the decision was arbitrary and capricious; the proceeding violated his First Amendment rights; the rules under which he was charged are unconstitutionally vague and overbroad; and prison officials had approved his possession of the letter he received and his notebook. Lindell attached to his petition what he described as essentially the entire record of the disciplinary proceeding.[1]

[1] Lindell's petition asserts the following: "Attached as Exhibit A is 49 pages … of documents, which includes all of the written materials which Lindell gave to prison officials concerning [the conduct report], all of the materials which the prison officials gave to Lindell relating to [the conduct report] and all of the written materials included as part of Lindell's administrative appeal …."

¶4 WISCONSIN STAT. § 802.05(3)(b)4 (2003-04)[2] provides that the court may dismiss a prisoner's action if it fails to state a claim upon which relief may be granted. Under this authority, the circuit court reviewed Lindell's petition and the attached record, and the court dismissed the petition upon concluding that it failed to demonstrate any reversible error in the disciplinary proceeding. On appeal, Lindell argues that his petition stated meritorious claims for relief on all of the issues he raised.

¶5 Determining whether Lindell's petition stated a claim for relief is a question of law, which we review de novo. *See* ***State ex rel. Treat v. Puckett***, 2002 WI App 58, ¶9, 252 Wis. 2d 404, 643 N.W.2d 515. In reviewing the petition we take all facts pleaded and all inferences from those facts as true. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). We dismiss a petition as legally insufficient only if we conclude that under no conditions can the petitioner prevail. ***State ex rel. Adell v. Smith***, 2001 WI App 168, ¶5, 247 Wis. 2d 260, 633 N.W.2d 231.

¶6 Lindell first contends that the circuit court erred when it found no merit to his sufficiency-of-the-evidence challenge because the court made its determination without the certified record of the disciplinary proceeding. However, the court had before it as attachments to Lindell's petition numerous documents that Lindell essentially described as constituting the record of the disciplinary proceeding and his administrative appeals that followed it. *See* footnote 1. Therefore, to the extent that the circuit court erred by relying on the

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

attachments to the petition in making its ruling, Lindell invited the error and we will not review it. *See* ***Binsfeld v. Conrad***, 2004 WI App 77, ¶26, 272 Wis. 2d 341, 679 N.W.2d 851.

¶7 Lindell next argues that the disciplinary committee acted arbitrarily and capriciously. He premises his argument, however, on his claim that the evidence did not support the decision of the disciplinary committee finding him guilty. We agree with the circuit court that Lindell's challenge to the sufficiency of the evidence lacks merit. The disciplinary decision recites that it relied on the statements in the conduct report, as well as the testimony of the reporting staff member, Lindell, his staff advocate and two inmate witnesses. The committee notes that it also had before it Lindell's written statement with exhibits, the allegedly altered notebook and two letters, one to Lindell and one from him to another person. In light of the committee's credibility determinations, we conclude that evidence it cites is sufficient to support its guilty findings on both charges.[3]

¶8 Lindell next asserts that the disciplinary committee's actions violated his first amendment right of free speech. It is well settled that prison security concerns justify limitations on a prisoner's First Amendment rights. *See* ***Gaines v. Lane***, 790 F.2d 1299, 1304-05 (7th Cir. 1986). A prison regulation is valid, even if it limits a prisoner's constitutional rights, if it is reasonably related to a legitimate correctional interest. ***Shaw v. Murphy***, 532 U.S. 223, 229 (2001).

[3] The letters and notebook are not in the record, but they are described in the conduct report.

Here, prohibiting gang activity and the possession of gang related material reasonably serves the purpose of maintaining order in correctional institutions.

¶9 The committee found Lindell guilty, in part, based on evidence in his notebook concerning the content of letters Lindell sent to persons outside the prison. A prison's restriction on a prisoner's outgoing mail must pass a stricter constitutional test than reasonableness. Under this test, the restriction must further an important or substantial government interest unrelated to the suppression of expression, and the restriction must be no greater than is necessary or essential to protect the government interest. *See* ***Lomax v. Fiedler***, 204 Wis. 2d 196, 206-14, 554 N.W.2d 841 (Ct. App. 1996). Here, we conclude that controlling or preventing gang activity in prisons is a substantial governmental interest, and that disciplining an inmate based on evidence of outgoing letters about gang activity is necessary to that interest.

¶10 The rules Lindell violated are not unconstitutionally vague. An inmate violates WIS. ADMIN. CODE § DOC 303.20(3) by participating in any activity with an inmate gang. WISCONSIN ADMIN. CODE § DOC 303.02(11) defines a gang as an inmate group that is not sanctioned by the warden. An administrative regulation is unconstitutionally vague when persons of common intelligence must necessarily guess at its meaning and differ as to its application. ***State ex rel. Kalt v. Board of Fire and Police Comm'rs for the City of Milwaukee***, 145 Wis. 2d 504, 510, 427 N.W.2d 408 (Ct. App. 1988). However, we will not entertain a constitutional vagueness challenge if the alleged conduct plainly falls within a rule or statutory prohibition. *See* ***State v. Burris***, 2004 WI 91, ¶53, 273 Wis. 2d 294, 682 N.W.2d 812. In this case, Lindell's conduct as alleged plainly constituted gang activity, and uncontested evidence showed that the "Aryan Circle" was a gang within the DOC's definition.

¶11 WISCONSIN ADMIN. CODE § DOC 303.47(2)(a) prohibits possession of "items of a type which are not allowed." Again, Lindell's conduct plainly fell within the scope of this rule. A person of common intelligence could not fail to appreciate the fact that documents referencing gang activity are not allowed in Wisconsin prisons.

¶12 Lindell also contends that he cannot be disciplined for possessing the letter he received from outside the prison because prison officials approved his possession of it. The record does not contain evidence that any prison official read the letter and nevertheless allowed Lindell to retain it. The evidence showed that an officer "scanned" the letter for contraband, but did not read it. Lindell also contends that prison rules allowed him to keep his notebook. However, he was not disciplined for merely possessing a notebook. He was disciplined because the notebook had been altered and because it contained gang-related material, both of which render possession of the notebook a violation of prison rules.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.